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# The American Constitution and Japanese *Minpō*, 1945-1980**

Project '87, designed to commemorate the bicentennial of the Constitution, has been stimulating the interest of American scholars in the U.S. Constitution for the past several years. While a growing number of historians, political scientists, and legal scholars are engaging in research on the Philadelphia Convention of 1787, the nature of the Constitution, and subsequent constitutional development, others are focusing their attention on foreign laws in order to assess the influence of the American Constitution abroad. This article deals with the impact of the U.S. Constitution on Japanese *Minpō* (Civil Law), which encompasses such fields of private law as property, contracts, torts, and family law.

Due to the profound impact American law has made on Japanese law, it is no exaggeration to say that Japanese law after World War II has developed in the direction of American law. The Potsdam Declaration, under which Japan accepted the terms of surrender, required the Japanese Government to "remove all obstacles to the revival and strengthening of democratic tendencies" among the Japanese people, and to establish "[f]reedom of speech, of religion, and of thought as well as respect for the fundamental human rights."[1] In the occupation of Japan by the Allied

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The research for this article was supported by a Japan Foundation Professional Fellowship. An earlier version was presented at the annual meeting of the American Historical Association Pacific Coast Branch, held at Stanford University, in June 1985. The author wishes to thank Mr. Jeffrey Falt, Professor William B. Gould, Professor John O. Haley, and Professor Chin Kim for their comments and suggestions.

**The Editorial Reviewer for this article is Rebecca Martin Seaman.

1. Oppler, *The Reform of Japan's Legal and Judicial System Under Allied Occupation*, 24 WASH. L. REV. 293 (1949).

Forces that followed, the American forces played a key role, and, therefore, reform of the Japanese legal system was primarily modeled after the American pattern.[2] American law continued to influence Japanese law after the termination of the occupation. Many American lawyers who first came as members of the General Headquarters (GHQ) returned to Japan as visiting professors, scholars, and practitioners, and helped stimulate and facilitate studies on American law.[3]

The fields of Japanese law most strongly influenced by American law are constitutional law, criminal procedure, corporation law, administrative law, and labor law. On Japanese *Minpō* there has been little direct influence of the U.S. Constitution: the influence was exhorted only indirectly through the Japanese Constitution. Thus, the present subject should be analyzed in a triangular context among the U.S. Constitution, the Japanese Constitution, and the *Minpō*.

The Japanese Constitution, which is often said to be a "made-in-USA" product, was established under the direction of GHQ, especially its Government Section. It was, therefore, directly influenced by the United States, although sources such as the Weimar and other European constitutions and the Japanese drafts were also utilized.[4] The impact of the American Constitution on the Japanese Constitution was strongest in Chapter III: Rights and Duties of the People, and in Chapter VI: Judiciary, where many similar provisions can be found.

The *Minpō* (Civil Code) is the basic and most important body of private law in Japan. It consists of five parts: general legal principles, law of property, law of obligations, law on relatives, and law of succession. The *Minpō* is accompanied by a number of satellite laws that expand and apply general principles in particular fields. The Japanese Civil Code is closely akin to the German Civil Code in both organization and content. Before enactment in 1898, almost thirty years of study and debate went into its construction, and it has worn well. There have been no important amendments, and its interstices have been solidly filled by judicial construction.[5]

The acceptance of the Potsdam Declaration and the promulgation of

2. Tanaka, *Nihon ni okeru Gaikoku Hō no Sesshu: Amerika Hō (Impact of Foreign Law in Japan: American Law)*, in GAIKOKU HŌ TO NIHON HŌ (FOREIGN LAW AND JAPANESE LAW) 300-01 (M. Ito ed. 1966).

3. *Id.* at 313-19; Noda, *Nihon ni okeru Hikaku-Hō no Hatten to Genjō (Comparative Jurisprudence in Japan: Its Past and Present)*, in THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS 221 (H. Tanaka ed. 1976).

4. Ito, *Nihon Koku Kenpō to Eibei Kenpō (The Constitution of Japan and the English and United States Constitutions)*, 600 JURISTO 150-51 (Nov. 15, 1975).

5. Blakemore, *Post-War Developments in Japanese Law*, 24 WIS. L. REV. 646 (1947); Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 23-31 (von Mehren ed. 1963).

the new constitution in 1946 called for a series of reforms in various areas of Japanese law. In the Civil Code reform was restricted to the Fourth and Fifth Books, which cover domestic relations and inheritance, commonly called the family law section. The first three books, dealing with the basic private individual rights, law of property, and law of obligations, commonly called the property law section, have remained virtually untouched, since no immediate need for a revision of these parts existed on constitutional grounds.[6] Indeed, the property law section of the Civil Code withstood the drastic reform of democratization and has maintained its "dignity and greatness," according to one Japanese scholar, because it had already fully adopted the basic principles of bourgeois democracy such as individualism, freedom, and modern capitalism embodied in the French Civil Code after the French Revolution and the German Civil Code at the end of the nineteenth century.[7]

The only provisions added to the first section of the Civil Code when the family law was revised in 1947 were articles I and I-2. They set forth the principles conforming private rights to the public welfare, fidelity and good faith, and prohibition of abuse of rights. These rights had already been fully recognized by scholars and courts, but received for the first time statutory sanction.[8]

Because of the drastic revision of only one part of the Civil Code, there emerged within the Civil Code two distinct parts: the property section is written in the old literal style (*bungo-tai*) with many Chinese characters not used in modern Japanese and with *katakana* (the square Japanese syllables), while the family law part is written in a modern colloquial style (*kogo-tai*) with *hiragana* (the cursive Japanese syllables).

Although the Civil Code in its property section remains largely unchanged, the *Minpō* has undergone in reality some significant transformations since the War. First, books I through III, though not revised, came to be interpreted in accordance with the spirit of the new constitution, which was greatly influenced by the American law. The second, and more important, vehicle for the transformation is the enactment of various supplementary statutes that either have modified or expanded the basic *Minpō* principles. From the Civil Code articles on the public-service corporation, for example, have evolved a series of special laws such as the religious corporation law, private school corporation law, medical corporation law, and social welfare work law that made the establishment

6. Oppler, *supra* note 1, at 317.
7. I. Kato, *Minpō—Sōron (The Civil Code—General Legal Principles)*, 361 JURISTO 131 (Jan. 1, 1967).
8. *Id.*; Koshikawa, *Principles of Equity in Japanese Civil Law*, 11 INT'L LAW. 306-17 (1977); Noda, *supra* note 3, at 118, 123.

of these public corporations easier and provided them with protection and social assistance. In other areas such as housing, mortgage system, damages and compensation, family registration, and real estate regulation, new special laws accelerated changes and helped transform the nature of the Civil Code considerably.[9]

The Civil Code, which covers a wide range of conduct between individuals and between family members, naturally stemmed from some important provisions in the Constitution. Such constitutional provisions that the United States Constitution strongly influenced are gathered together in Chapter III as Rights and Duties of the People. The two most important provisions are article 24 concerning the family law and article 29, the property section of the Civil Code.

One of the important civil rights guaranteed by the U.S. Constitution is due process of law. The fifth amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."[10] The fourteenth amendment states that "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[11] Due process of law has found its way into the Constitution of Japan. Article 31 states, "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."[12] The obvious difference between the provisions of the two constitutions is that the word "property" is not included in the Japanese clause. Japanese scholars reason that the drafters were familiar with the bitter experience of the New Deal government, when a number of economic measures were declared unconstitutional as an assault on private property, and wanted to eliminate such problems by avoiding reference to property in the due process clause of the Japanese Constitution.[13] Due process of law in Japan has thus been narrowly interpreted to cover only criminal process, although recently some scholars have tried to interpret it broadly to include some of the administrative processes.[14]

The property right, however, is fully guaranteed in article 29. This article, the basic constitutional provision for the first three books of the Civil Code, states that "[t]he right to own or to hold property is inviolable. Property rights shall be defined by law, in conformity with the public

9. I. Kato, *supra* note 7, at 131.
10. U.S. CONST. amend. V.
11. U.S. CONST. amend. XIV, § 1.
12. KENPŌ art. 31.
13. Ito, *supra* note 4, at 153.
14. Shimoyama, *Gyosei Tetsuzuki to Jinken* (*Administrative Procedure and Civil Rights*), 638 JURISTO 350 (May 3, 1977).

welfare."[15] Although the actual wordings are considerably different, the Japanese scholars are in full agreement that article 29 of the Japanese Constitution, which sets forth the basic property right, is a clear manifestation of the careful study of American property rights under the fifth amendment and its subsequent development.

The eminent domain provided in the fifth amendment came to be fully recognized by the Japanese Constitution. While the American provision states, "nor shall private property be taken for public use, without just compensation,"[16] the Japanese counterpart states the power more positively: "Private property may be taken for public use upon just compensation therefor."[17] In order to implement this general policy a supplementary law of the Civil Code, the Land Expropriation Law, was enacted in 1951.[18] The most important issue has always been the definition of the public interest that justifies the taking of private property. Taking land for the construction of roads and highways for the preparation of the Tokyo Olympics in 1964 became one of the hottest controversies in eminent domain.[19]

Perhaps the most serious controversy on eminent domain arose from the agricultural land reform initiated by the Occupation under General Douglas MacArthur. The main objectives of the land reform were to eradicate the old landlord system, in which the tenant farmers had suffered, and to make the farmers more independent and the farm communities more democratic, by creating owner-farmers with a maximum area of land of 3 *chobu* (7.35 acres). It demanded the compulsory transfer to the cultivators of all lands belonging to absentee landlords and all tenanted land of resident landlords over 1 *chobu* (2.45 acres). As the result, a massive redistribution of agricultural land took place creating a large number of independent farmers.[20]

The landlords, however, put up a vigorous fight against the land reform that brought about such drastic changes, deeply affecting their way of life. The most effective protest took the form of law suits. Of the more

15. KENPŌ art. 29.

16. U.S. CONST. amend. V.

17. KENPŌ art. 29.

18. Sugimura, *Tochi Shuyō Seido ni tsuite* (*On the System of Eminent Domain*), 33 HŌRITSU JIHŌ, No. 6, at 4-10 (1961); Suzuki, *Tochi Shuyō to Shoyūken no Hogo* (*Eminent Domain and the Protection of Property Rights*), 33 HŌRITSU JIHŌ, No. 6, at 11-16 (1961).

19. Suzuki, *supra* note 18, at 16.

20. Kokura, *Nōgyō Hō no Risō to Genjitsu* (*The Ideal and Reality of Agricultural Law*), 35 HŌRITSU JIHŌ, No. 8, at 10-12 (1963); Narita, *Tochi Seido* (*Land System*), 361 JURISTO 106-07 (Jan. 1, 1967); 1, Kato, *Nōchi Seido* (*the Agricultural Land System*); 316 JURISTO 290-91 (Jan. 1, 1967); Wagatsuma, *Nōchi Kaikaku wa Kenpō Ihan ka* (Is the Agricultural Land Reform Unconstitutional?), 2 HŌRITSU TAIMUZU 20-28 (1948); R. DORE, LAND REFORM IN JAPAN 129-98 (1959).

than 4,000 civil suits, 119 cases dealt specifically with the constitutionality of the land reform. The landlords demanded recompense from the state, insisting that the land reform was unconstitutional because the purchase prices were not "just compensation" as provided in article 29, section 3 of the Constitution. All the earlier court decisions uniformly maintained that the land reform was done for the public purpose. The courts reasoned that even when the taking directly benefited particular individual farmers who received the land, it ultimately benefited the public by making society more democratic and by stimulating agricultural production.[21]

The landlords argued that the value of the land the government set became grossly distorted due to rapid inflation. They pointed out that the money the government paid for one *tan* (0.245 acres) would not even buy three salmon! It was, they insisted, virtually "a confiscation without compensation." The courts differed widely on this subject, but the majority of the decisions held that the agricultural land had no market value because of a number of rigid restrictions on sale, selling value, and conversion to other uses.[22] Until the middle of the 1950s all the civil suits instituted by the landlords were decided against them.[23]

Meanwhile, new developments were transforming Japanese society, shaking the very foundation of the system established by the land reform. High economic growth greatly affected agricultural areas, making the family structure smaller and nuclear. Outside employment with high income reduced many farmers to part-timers. As the demand for lots for houses and industrial plants increased, farm land ceased to be the means of production but became a commodity to be sold at high market prices, thus causing further fragmentation of the farm land. Many children who previously would have waived the right to inherit now demanded partible inheritance.[24]

Within only ten years or so after the land reform, therefore, it became increasingly difficult to guarantee the position of small, independent farmers that the reform created. The high economic development not only resulted in mass migrations of people to the cities but also increased the

21. I. Kato, *Nōchi Kaikaku Ikensosho no Dōkō* (*The Cases on the Constitutionality of Agricultural Land Reform*), 68 HŌGAKU KYOKAI ZATSHI 368-70 (1950); M. Kato, *Nōchi Kaikaku to Kenpō* (*The Agricultural Land Reform and the Constitution*), 29 DŌSHISHA HŌGAKU 77-81 (1955).

22. I. Kato, *supra* note 21, at 371-96; M. Kato, *supra* note 21, at 81-90; Imamura, *'Seitō na Hoshō' no Imi* (*The Definition of 'Just Compensation'*), 42 MIN SHŌ HŌ ZATSHI 586-607 (1960).

23. I. Kato, *supra* note 21, at 356-66.

24. Kuroki, *Nōka to Sōzoku* (*Agricultural Families and Succession*), 6 JURISTO SPECIAL ISSUE 325 (1977); Tanaka, *Legal Equality Among Family Members in Japan—The Impact of the Japanese Constitution of 1946 on the Traditional Family System*, 53 S. CAL. L. REV., 640 (1980).

demand for a stronger agricultural production force. A new law was passed in 1961 that shifted emphasis from the ownership to the operation of farm land, and the former laws were revised, relaxing restrictions on land-holding and allowing individual farmers to acquire larger pieces of land than the legal limits.[25]

These new developments, together with the tireless campaign of ex-landlords against injustices done to them, led to the government's reconciliatory gesture to compensate the landlords for their losses. The Law Regarding Payment of Benefits to the Former Landlords was passed in 1965, but it has been criticized for the smallness of the compensation, which was to be paid by even installments for the span of five or ten years, and for a troublesome procedure.[26]

The high economic development demanded not only large capital and labor force but land for industrial plants and houses, at the expense of agriculture. A large number of people began to move into cities from the countryside, and in the rural areas surrounding large cities, where the heavy concentration of people and the extensive construction of factories and plants became more and more evident, the diversion of farm land for nonagricultural purposes, which had previously been strictly prohibited, became an ever-growing phenomenon, skyrocketing the price of farm land. As early as 1959, the conversion came to be publicly sanctioned by the Ministry of Agriculture and Forestry.[27]

The selling of land as plant or house lots or for highways with huge profits by former tenant farmers, who had bought it in the land reform very cheaply, has created a great sense of injustice and unfairness to the former landlords. A case the Japanese Supreme Court decided in 1968 involved just such a land sale. The plaintiffs (a group of eighteen former landlords) sued defendants (a group of fourteen) for unjust enrichment. Plaintiffs had been forced to sell the farm land cheaply (hardly just compensation) to the defendants, who later sold it to the Public House-Building Corporation at a price several thousand times over the original price. The Supreme Court, however, ruled that the existing principle of unjust enrichment could not provide such relief for the former landlords. As long as the land transfer was made in accordance with the reform policy, the transfer was final. When the farmer sold the land as house lots at a high price, gaining a huge profit within a short period of twenty years, the

25. Harada, *Nōchi Rippō to Rippō Gaku* (*Agricultural Land Legislation and the Study of Legislation*), 53 HŌRITSU JIHŌ, No. 14, at 126-28 (1981); I. Kato, *supra* note 20, at 291.

26. Waseda, *Nōchi Hoshō Hō to Kyū jinushi Dantai* (*The Law Regarding Payment of Benefits to the Former Landlords and the Association of Former Landlords*), 37 HŌRITSU JIHŌ, No. 9, at 33-38.

27. Narita, *supra* note 20, at 107-09.

Court insisted, it had no choice but to recognize the profit as his, as long as the conversion was legal.[28]

Article 29, section 3 of the Constitution, which states that the government can take private property for a public purpose, can be also interpreted as guaranteeing that the government cannot take private property other than for public use. It would follow, then, that if the original purpose of taking property no longer exists, the public taking should be cancelled and the land be returned to the owners. The Court, however, did not adopt this interpretation.

During the 1960s, it became increasingly clear that the amount of agricultural land an individual family could own was not a serious problem. Such an atmosphere came no doubt to affect the court decisions. Lawsuits instituted by the former landlords against the government or former tenant farmers seeking invalidation of the land transfers were numerous. In some of these cases decided in the 1960s, the court, after a long delay, ruled in favor of the plaintiffs.

In Osaka Prefecture, for example, of 370 cases that were brought before the court by 1966, the state lost in 110 cases.[29] Even those who won favorable judgments, however, were faced with the problem of the statute of limitation. According to the Special Act for the Creation of an Owner-Farmer System, the period of prescription was ten years after the completion of land transfer from landlords to tenant farmers. It should be noted that delayed trials have been a common but serious phenomenon in the Japanese judiciary.

A case filed at the Osaka District Court in 1948 by a landlord against the *H* city land committee was not decided until 1965. Although the court found for the plaintiff and invalidated the land transfer, he was unable to regain the land. The land at issue had already passed on to a third party. The court maintained that the statute of limitation had run out, asserting that prescription would not be interrupted by the plaintiff's mere action of instituting a suit.[30]

Another important provision in the Japanese Constitution that has a direct bearing on the Civil Code is article 13. It states: "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other govern-

28. Taniguchi, *Hanrei Hihyo—Nōchi Tenyō* (*Commentary on a Supreme Court Decision on Transfer of Farm Land*), 59 MIN SHŌ HŌ ZATSHI 983-93 (1969).

29. M. Kato, *Nōchi Baishu Torikeshi to Shutoku Jiko* (*The Cancellation of Farm Land Confiscation and Prescription*) (*1*), 19 DOSHISHA HOGAKU No. 2, at 2 (1967).

30. *Id.* at 1-16; M. Kato, *Nōchi Baishu Torikeshi to Shutoku Jiko* (*The Cancellation of Farm Land Confiscation and Prescription*) (*2*), 19 DOSHISHA HOGAKU No. 3, at 71-89 (1967).

mental affairs."[31] This article has obviously been drawn upon the Virginia Bill of Rights and the Declaration of Independence of 1776. Although the U.S. Constitution does not specifically enumerate such rights as life, liberty, and pursuit of happiness, except for the due process clause in the fifth amendment, the ninth amendment clearly made human rights inclusive: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[32] The Japanese Constitution does not have a provision comparable to this article, but scholars and courts tend to understand the fundamental human rights broadly. This interpretation has been used to make "the pursuit of happiness" in article 13 inclusive.[33]

The most important means in the Civil Code to safeguard the individual rights guaranteed by the new Constitution is the law of torts, which remained unchanged until after World War I. It was, ironically, in this field of the Civil Law that Japanese scholars and courts have been most strongly influenced by the American law. For one thing, the Japanese law of torts set forth only a few basic rules within a rough framework (articles 709-724) so that more sophisticated ideas and principles could be incorporated easily into the general framework. Moreover, the American law of torts has developed into the most advanced body of law, combined with the introduction of the American approach to esteem the fundamental human rights through American law.[34] The American law of torts covers almost all tortious acts, which include battery, assault, false imprisonment, trespass to land, negligence, strict liability, nuisance, defamation, misrepresentation, and privacy and can be used to recover for any illegal encroachment.[35]

Perhaps two of the most important constitutional human rights that can be treated in tort law are privacy and environmental rights. Privacy conflicts with the freedom of speech and expression guaranteed by the Japanese Constitution. Article 21 declares that "[f]reedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of

31. Horibe, *Kihonteki Jinken—Hyogen no Jiyū O Chusin to Shite* (*Fundamental Human Rights, Especially Freedom of Expression*) 600 JURISTO 163-71 (1975).

32. U.S. CONST. amend. IX.

33. Shimoyama, *Kenpō Dai 31 Jō to* (*Article 31 of the Japanese Constitution and*) *Due Process of Law*, 33 HŌRITSU JIHŌ, No. 4, at 6 (1961).

34. I. Kato, *Zadankai—Nihon Hō to Eibei Hō No Sanjunen* (*Symposium—Thirty Years of Japanese Law and Anglo-American Law*) 600 JURISTO 38 (Nov. 15, 1975); I. Kato, *Nihon Fuhō Koi Hō no Konnichi teki Kadai—Amerika Hō to no Hikaku ni oite* (*The Present Task in the Japanese Law of Torts: Comparison with American Law of Torts*), 36 HŌRITSU JIHŌ No. 5, at 10-15 (1964); Morishima, *Fuhō Koi Hō* (*Law of Torts*) 600 JURISTO 226-30 (Nov. 15, 1975).

35. I. Kato, 36 HŌRITSU JIHŌ, No. 5, *supra* note 34, at 10-11.

any means of communication be violated."[36] This article is, of course, based upon the first amendment to the U.S. Constitution. The Japanese Constitution, however, clearly enumerates "freedom of association" and "prohibition of censorship," which are not stipulated in the American Constitution. But American decisional law has construed them as part of the First Amendment. The more specific and precise provision of the Japanese Constitution clearly reveals that it took full cognizance of not only the American Constitution but its subsequent judicial development.[37]

Article 21 of the JaJapanese Constitution strictly follows the U.S. Constitution, unconditionally guaranteeing rights of mental freedom like freedom of press and speech, whereas constitutions of many other countries place conditions on such rights. In fact, at the drafting stage, when the Japanese drafters expressed some fear about unconditional freedom of speech and press, the GHQ lawyers assured them that the freedom does not mean an absolute guarantee even though it was literally unrestricted, citing the American practice, which clearly demonstrates that these guarantees have never been totally absolute in operation.[38]

Although the Japanese Constitution says "[f]reedom of . . . speech, press and all other forms of expression are guaranteed," this is construed to mean in actuality, as in the case of the U.S. Constitution's first and fourteenth amendments, that no government can make laws prohibiting or abridging the freedom of speech or of the press. Since the court has the ultimate power to judge the constitutionality of these laws, the criteria for judging constitutionality thus becomes very important.[39] In the freedom of speech and press in Japan, American court decisions, treatises, and doctrines such as the bad tendency test, clear and present danger, and preferred position, were fully studied and came to be used as important criteria.

The famous article by S.D. Warren and L.D. Brandeis, "The Right to Privacy,"[40] that has made a great impact on the American law of privacy, did not influence greatly the thinking of Japanese lawyers until after World War II, but it thereafter became a sort of Bible in the area of privacy. In Japan privacy was at first conceived as a problem of torts, such as defamation, false imprisonment, trespass to land, encroachment on ownership, misrepresentation, and nuisance, and of compensating the appropriate damage accordingly.[41] It became increasingly clear, however, that many

36. KENPŌ art. 21.
37. Horibe, *supra* note 31, at 164-65.
38. Ito, *supra* note 4, at 153.
39. Horibe, *supra* note 31, at 165.
40. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
41. Horibe, *Puraivashi* (*Privacy*), 49 HŌRITSU JIHŌ No. 7, at 66-69 (1977).

situations existed that did not fit into the usual categories. Use of pictures and names without permission, public exposure of a person's past history and background, disclosure of private correspondence, wiretapping, shadowing, and publication of critical articles on personal family relations, for example, do not necessarily fit in the category of defamation. There is, indeed, an unusually large area of encroachment that could not be solved by defamation. Moreover, the public policies of protecting individuals in defamation and privacy are fundamentally different. The right of privacy is designed to protect individuals to be free from society at large and to be left alone to enjoy private life.[42]

Gradually, scholars and courts began to focus their attention on the inherently confrontational relations between privacy on one hand and the freedom of speech and expression and public right to know on the other. Legal treatises appeared treating privacy strictly as a constitutional right. Privacy began to be treated as a public right as well as a private right between individuals.[43]

The Japanese Constitution, though it has greatly promoted the spirit of human dignity, did not establish any provision regarding privacy. It was recently revealed, however, that during the drafting stage a suggestion was made by the Occupation lawyers to enumerate the right of privacy as part of the fundamental human rights.[44]

The theory of privacy in America has long been defined as "the right to be let alone," to be inclusive and universal. Such a right should not be understood as a tort but as a constitutional right. The case in which the U.S. Supreme Court clearly recognized privacy as a constitutional right is *Griswold v. Connecticut*.[45] American treatises since then have turned the passive "right to be let alone" into a more positive definition, "the person's right to define the extent other individuals could use his or her personal information."[46] Taking this new trend in the United States fully into consideration, Japanese scholars and courts began to view the right to privacy as derived from the right to "the pursuit of happiness" in article 13 of the Constitution of Japan.[47]

42. Mishima, *Nihon Minpo to Puraivashi Ken* (*Japanese Civil Code and Right to Privacy*), 31 HŌRITSU JIHŌ No. 6, at 29-34 (1959).

43. Horibe, *supra* note 41, at 69.

44. K. TAKAYANAGI, I. OTOMO, & H. TANAKA, NIHON KENPŌ SEITEI NO KATEI (THE DRAFTING PROCESS OF THE CONSTITUTION OF JAPAN), I, at 9 (1972).

45. Griswold v. Connecticut, 381 U.S. 479 (1965).

46. Horibe, *supra* note 41, at 71.

47. Horibe, *supra* note 41, at 72-73; Sakamoto, *Kenpō to Puraivashi* (*The Japanese Constitution and Privacy*), 22 KOBE HŌRITSU ZATSHI No. 1 (1972); Okudaira, *Kenpōjo no Puraivashi no Kenri ni tsuiteno Ichi Kosatsu* (*A Study on the Constitutional Right to Privacy*) in KŌHŌ JŌ NO RIRON (THE THEORIES OF THE PUBLIC LAW) (pt. I) at 63 (1976).

Another important constitutional guarantee, environmental right, also started as a tort problem in the Civil Code as invasions of personal interests. For this reason, American nuisance law, which covers a wide range of daily life, came to be extensively applied in Japan. But American nuisance doctrine is designed mainly as a remedy for a wrongful act resulting in merely inconvenient or unpleasant situations in daily life or at most the fall in price of particular property. The Japanese public hazards, which developed as by-products of the high economic growth since the 1960s, began to threaten the environment, causing more serious damage such as loss of lives and permanent injuries to human bodies, making the nuisance theory obsolete for remedies.[48]

It became clear in the United States by the beginning of the 1960s that as a remedy for environmental problems, the nuisance theory, which concentrates on post-event compensation, was no longer useful. The modern environmental law in America has been concentrating on prevention and the use of injunctions for environmental protection rather than damages for wrongful actions. Just as the American theory of privacy greatly influenced the Japanese right to privacy, American environmental law has been making a great impact on the Japanese law.[49]

The American environmental movement has tried two approaches to the problems. The first is an approach to find the environmental right within the existing provisions of the Constitution. It is maintained that freedom from pollution and the right to enjoy a clean environment are included in "liberty" in "life, liberty, or property" in the fifth and fourteenth amendments or in "others retained by the people" in the ninth amendment.[50] Among the new theories, the public trust doctrine in natural resources law has been the most fruitful. This doctrine, advanced by Professor Joseph Sax, is by no means an entirely new idea but, like the privacy doctrine of Warren and Brandeis, is built upon the tradition of common law and a series of court cases.[51]

These American developments stimulated the formation of a new environmental rights theory in Japan. This theory holds that an injunction should be granted irrespective of whether there exists a direct danger to health, where environmental quality is threatened. Scholars and courts supporting this doctrine argue that such environmental rights are implicitly recognized in "the pursuit of happiness" in article 13 and "the right to

48. Morishima, *supra* note 34, at 227-28.

49. *Id.* at 228.

50. Takahashi, *Amerika Kanykō Hō (American Environmental Law)* 600 JURISTO 292 (Nov. 15, 1975).

51. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

maintain the minimum standard of wholesome and cultural living" in article 25.[52]

Quite different from the first three books of the Civil Code, where Americanization occurred only through judicial interpretation and legal treatises because the statute remained unchanged, the last two books (IV and V) underwent drastic changes after World War II. Article 24 of the Japanese Constitution, which provides the basic principles of the family law, just as article 14 does to the property section of the Civil Code, declares that marriage shall be based only on the mutual consent of both sexes and shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. It further states that "[w]ith regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes."[53]

The American Constitution does not have a comparable provision, but "the equal protection of the law" in the fourteenth amendment, the inclusiveness of human rights in the ninth amendment, and the women's voting right in the nineteenth amendment seem to have guaranteed, in theory at least, women's rights and position. In the late 1960s, the women's liberation movement renewed an earlier desire on the part of women to assert women's rights more forcefully. Eventually this led to the proposal of the twenty-seventh amendment by Congress in 1972. It declared that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Within three years of its passage, thirty-five of the required thirty-eight states had ratified the Equal Rights Amendment (ERA). By 1979, the end of the seven-year ratification, however, no additional states had approved it. Although Congress extended the time limit to 1982, the ERA failed to gain the three additional state ratifications.[54] A significant fact is that more than two-thirds of the states have already ratified the ERA, and the idea embodied in the ERA has been fully put into practice in these states and throughout the nation through Supreme Court decisions.

52. Takahashi, *supra* note 50, at 291-92; J. GRESSER, K. FUJIKURA, & A. MORISHIMA, ENVIRONMENTAL LAW IN JAPAN 136 (1981); Upham, *After Minamata: Current Prospects and Problems in Japanese Environmental Litigation*, 8 ECOLOGY L.Q. 264 (1979); Sakuma, *Kofuku Tsuikyū Ken (The Right to the Pursuit of Happiness)*, 638 JURISTO 264-69 (May 3, 1977).

53. Oppler, *supra* note 1, at 318; Steiner, *Postwar Changes in the Japanese Civil Code*, 25 WASH. L. REV. 294 (1950); Watanabe, *The Family and the Law: The Individualistic Premise and Modern Japanese Family Law*, in LAW IN JAPAN: THE LEGAL ORDER OF A CHANGING SOCIETY 372-73 (von Mehren ed. 1963).

54. A. KELLY, W. HARBISON, & H. BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS & DEVELOPMENT 734-35 (6th ed. 1983).

As if to have anticipated this trend in the United States, the Japanese Constitution as early as 1946 guaranteed the equality of sexes not only in domestic relations (article 24) but also in society in general (article 14), which simply states: "All the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin."[55] The Japanese Constitution established, as a whole, a much more liberal, more clear-cut statutory position as to equality of sexes and dignity of human beings than that of the United States Constitution.

To comply with article 24, the part of the Civil Code dealing with family law had to be drastically revised. The revised Civil Code, which took effect on January 1, 1948, abolished the old family system called the House (based upon the rights of house heads and inheritance of the headship), established new relationships between husband and wife and between parents and child by eliminating discrimination and inequality, and formulated a modern, democratic succession system.[56]

In the practical application of the new Civil Code, Japanese family law came to be greatly influenced by the American law during the 1950s and 1960s. The period witnessed a growing importance of the Family Court, which was established in 1949 for promoting the democratization and Americanization of Japanese family law.[57]

The impact of American law has been felt most strongly in relation to the status of married women, especially their financial position. Although it has raised the legal status of women to one of equality, the new Civil Code has not guaranteed actual equality for women. *Zaisan bunyo* (division of matrimonial property), provided for in article 768, was at first construed to be a kind of severance settlement or temporary compensation for an economically weak wife after divorce. More recently, scholars have been advocating that the wife is entitled to half of the husband's earnings because such earnings are the product of their joint efforts. More significantly, Japanese scholars have begun to take note of a new trend in America to view the family property as belonging to the family organism and urge the adoption of some kind of community property concept.[58]

A similar trend has developed regarding the status of the wife in intestate succession. Stimulated by the American dower right, the intestate succession rights, and a preemptive right of the surviving spouse, the Civil Code

55. KENPŌ art. 14.

56. Kawashima, *Americanization of Japanese Family Law, 1945-1975*, 16 LAW IN JAPAN: AN ANNUAL 55-56 (1983).

57. *Id.* at 60-61.

58. *Id.* at 62-63.

was revised in 1981, providing a larger share for the spouse on intestate succession.[59]

While the liberal provisions of the new *Minpō* based upon article 24 of the Japanese Constitution have gradually broadened their inherent characteristics and have been interpreted more fully to the letter, the *Minpō* has retained some old systems, which in the society of the 1940s and 1950s did not perform their intrinsic democratic function but which the change in society eventually made work. The divorce by agreement, which has been retained in the new code as one of the two types of Japanese divorce, is a case in point. The Japanese consent divorce is unique: it has no comparable arrangement anywhere in the world. The consent divorce, which requires only two basic things, mutual agreement and registration, is private, speedy, inexpensive, and therefore very convenient. The system of divorce by mutual agreement in Japan, which can be traced back to the early eighth century, was adopted by the original Civil Code of 1898, recognizing in essence the freedom of divorce.[60] Ironically, however, the Civil Code established the system of the House (*ie*) administered by the arbitrary power of the House head (*koshu*), in which all House members were subordinate to the interest of the House. The divorce by agreement, though at a glance appearing very modern, was not concluded by the mutual agreement of the two individuals but became a very premodern institution used only to promote the interests of the House.[61]

In the process of the revision, the issue of divorce by agreement led to fervent discussion. Should it be maintained as it had been, modified and placed under the supervision of the court, or abolished entirely? The drafting committee voted to retain the divorce by agreement as it had been without any restriction.[62] The strongest demand for revision came from the Occupation, when the draft was submitted to it. Thomas L. Blakemore, one of the Occupation lawyers, requested that the matter be discussed and voted on in the Diet.[63] The Lower House, however, voted to keep the original provision. In the House of Councillors, an amendment requiring the attestation of the family court for divorce by agreement before registration was proposed and passed, but it was defeated in the Lower House by more than a two-thirds majority.[64]

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59. *Id.* at 64.

60. Miyai, *Kyogi Rikon ni tsuite* (*On Divorce by Mutual Agreement*), in GENDAI NO RIKON MONDAI (PROBLEMS OF THE MODERN DIVORCE) 235-41 (T. Ota ed. 1970).

61. *Id.* at 240-41.

62. SENGO NI OKERU MINPŌ KAISEI NO KEIKA (THE PROCESS OF THE REVISION OF THE CIVIL CODE AFTER THE WAR) 192-93 (S. Wagatsuma *et al.* eds. 1956).

63. *Id.* at 195-96.

64. *Id.* at 196.

The new Code thus came to retain the divorce by agreement, which in theory conforms well to the equality ideal between husband and wife. Repeated attempts were made to place all consent divorces under the family court, but failed. Thus the divorce by agreement provided under article 763 has continued up to the present time without modification. This system of divorce, which could be achieved privately without involving any public authorities, continued to be abused and misused as before. It has frequently been used as a device for the actual "expulsion of the wife." One of the more common practices is the disguised divorce, in which the spouses, who do not have a real intention to divorce and continue to live as husband and wife, agree to register the divorce in order to achieve some temporary objectives.[65]

To what extent does the divorce by agreement guarantee the rights of women? Actual equality of women regarding divorce is, of course, closely related to their economic independence. Many lawyers and legal scholars continue the argument started in 1946, maintaining that the existing law is not satisfactory. They insist that the family court should be given the authority to examine the real intention of the parties. Some go so far as to advocate the elimination of divorce by agreement entirely. Perhaps the most cogent argument was advanced by Professor Michio Aoyama, who insisted on either abolishing the system of private divorce or establishing some method of examining the genuineness of the will of the parties in order to protect fully the status of wives. To guarantee the dignity of the individual and the essential equality of the sexes under the existing conditions in Japan there is no positive reason to continue the system. Freedom of divorce and freedom of marriage, he points out, are essentially different.[66]

The supporters of the existing system, mostly younger and more recent scholars, maintain that it is not the system that needs change or modification. The real purpose of providing the divorce by agreement, along with the judicial divorce, was for the spouses to terminate their marriage without exposing their private and personal problems. Adding some conditions, even to the extent of verifying the will of the parties, is against the basic tenet of the system. It is the changing society, especially the

65. Yamahata, *Kyogi Rikon* (*Divorce by Agreement*), 29 HŌGAKU SEMINA 23-24 (Aug. 1958); Z. NAKAGAWA, KAZOKU HŌ KENKYU NO SHO MONDAI (MAJOR ISSUES IN THE STUDY OF FAMILY LAW) 102-18 (1969); J. NAKAGAWA, HANREI SHINZOKU HO (CASE STUDY IN THE FAMILY LAW) 61-69 (1969).

66. Aoyama, *Kyogi Rikon ni tsuite* (*On Divorce by Agreement*), 31 HŌRITSU JIHŌ No. 10, at 56-58 (1958).

growing self-consciousness among women, they argue, that is making the system increasingly more effective.[67]

Significantly, one of the important groups that rejected the proposed provision requiring the attestation of the court in 1947 and continues to support fully the system of divorce by agreement is a group of women lawyers, judges, and legal scholars. Since the inception of the controversy, they have argued that divorce by agreement is a very rational system that should be retained at all costs. Although they fully recognize the fact that the main victims of the divorce by agreement had been women themselves, these women lawyers regard the amendment, which was apparently designed to protect women's rights, an unjust encroachment upon freedom of divorce. They well understood that the Japanese society of the 1950s and early 1960s was not ideal for the promotion of women's status, but they perceived that the potential force of the system could be effectively utilized by women for their liberation. They have, therefore, endeavored to make society better, in which this liberal system could grow rationally to work fully and smoothly.[68]

Such a perception proved to be correct. The Japanese society since the late 1960s has been moving exactly in the direction these women lawyers were anticipating, making the divorce by agreement a very useful and effective device for women as well as men. The spectacular economic development that started in the late 1950s expanded the opportunities for women, creating a strong sense of equality between the sexes. The American women's liberation movement and the proposed Equal Rights Amendment have also been influencing the position of Japanese women in every possible way, creating the situation in which articles 14 and 24 could be fully put into practice. In the Japanese society of the 1970s and 1980s, the inferior social, economic, and political positions of women have been rapidly eradicated, making the fair, equal agreement for divorce between the spouses more feasible. The major current concern in the divorce by agreement is no longer the protection of women but the welfare of the children, who are increasingly considered to be the major victims of divorce, which, to many spouses, is becoming more and more unavoidable.

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67. I. Kato, *Danjo Dōken* (*Legal Equality of the Sexes*), In KAZOKU HO TAIKEI (AN OUTLINE OF THE FAMILY LAW), I: KAZOKU HO SORON (AN INTRODUCTION) 324 (1959); K. MIYAZAKI, SHIN KONIN HO (THE NEW LAW OF MARRIAGE) 146 (1950). Nakagawa, *Minpō ni okeru Danjo Byōdō* (*Equality of the Sexes in the Civil Law,*) 53 HŌRITSU JIHŌ No. 8, at 18 (1981).

68. *Zadankai—Fujin Hōritsuka Ni Yoru Minpō Sai Kaisei Iken* (*Symposium—Opinions of Women Lawyers on the Proposal of Revision of the Minpo*) (Pt. II), 114 JURISTO 38-39 (Sept. 15, 1956).

The divorce by agreement is, by nature, a very democratic and idealistic system based upon strict equality of the sexes. But in the Japanese society before and even after World War II, it continued to be misused because of actual inequality of the sexes. It has become effectively utilized in the 1970s and 1980s largely because of the drastic improvement of the status of women and their economic, political, and social independence. As far as women's status and rights are concerned, Japanese society is becoming rapidly Americanized. This trend, in turn, is providing the possibility of implementing divorce by agreement in the United States, especially in California and Washington, where the divorce procedure has been greatly simplified when both parties are in full agreement.[69]

In conclusion, the examination of the Japanese *Minpō* against the background of the United States Constitution reveals the profound impact the latter has made on the former. There are a number of the *Minpō* provisions where formal and direct influences of the American Constitution are clearly evident. More important, however, is the latent influence through court decisions and scholarly treatises, covering a wider area of the field, which has been significantly transforming the general nature of the *Minpō*.

69. Kojima, *Ōbei Minji Saiban ni okeru Shinchōryu* (*New Trends in Civil Law Cases in Europe and America*), (pt. 11), 17 HIKAKU HŌ ZATSHI 247-52 (1983).